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21 February 2019

Ex Parte

Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Expanding Flexible Use of the 3.7 to 4.2 GHz Band et al.; GN Docket No. 18-122, RM-11791 & RM-11778.

Dear Ms. Dortch:

There are a variety of mechanisms the Commission can use to transfer the use of C-band spectrum to terrestrial mobile services: but the current proposal from the C-Band Alliance ("CBA") is not one of them. This proposal is internally contradictory and is undone by the very precedent on which it purports to rely. It also disavows the economic incentives needed for a quick transition, and instead would clear the band using the heavy-handed government mandates it decries.

In a series of recent ex parte filings, the CBA claims its current proposal is supported by FCC precedent and assails competing proposals on the ground that they are insufficiently voluntary.[1] Yet this proposal—which requires C-band satellite operators to have had past U.S. C-band revenue in order to be compensated for the future loss of spectrum—contradicts the precedent on which the CBA relies. Moreover, the CBA's criticism of other proposals applies doubly in the case of the CBA's own current plan, which would clear its competitors and customers by regulatory fiat without even attempting to incentivize their participation.

These latest letters thus underscore the incoherence of the CBA position and the many reasons why adopting its current plan would be arbitrary, capricious, and guaranteed to fail. The Small Satellite Operators ("SSOs") urge the Commission to pursue an alternative that, unlike the CBA plan, would incent cooperation by all C-band stakeholders and recognize taxpayer interests in this spectrum.[2]

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[1] *See* Letter from Jennifer D. Hindlin, Counsel, CBA to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Jan. 2, 2019) ("CBA Jan. 2, 2019 Letter"); Letter from Jennifer D. Hindlin, Counsel, CBA to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Jan. 31, 2019) ("CBA Jan. 31, 2019 Letter"); Letter from Jennifer D. Hindlin, Counsel, CBA to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 4, 2019); Letter from Jennifer D. Hindlin, Counsel, CBA to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 6, 2019) ("CBA Feb. 6, 2019 Letter").

[2] *See* Reply Comments of ABS Global Ltd., Hispasat S.A., and Embratel Star One S.A. at 21-26, GN Docket No. 18-122 (filed Dec. 11, 2018) ("SSO Reply Comments") (proposing an equitable and incentive-based distribution and scoring model); *see also* Letter from Scott Blake Harris, Counsel, SSOs to Marlene H. Dortch,

I. The CBA's Precedent Conflicts With its Own Past Revenue Requirement.

Relying on decisions governing UMFUS, AWS-1, AWS-4, and EBS/BRS spectrum, the CBA claims that the Commission frequently grants "additional or new flexible-use rights" that incumbent licensees "could then use or transfer," and that Commission precedent therefore supports the CBA's market-based proposal.[3] Whether or not these decisions support a market-based transition *in general*, however, they foreclose the *specific* approach proposed by the CBA.

Under its proposal, the CBA would require any satellite operator with an FCC C-band authorization to have had U.S. C-band revenues in 2017 in order to participate in transition proceeds.[4] The CBA's requirement of past revenue, which *by definition* excludes licensed competitive entrants (all of whom have shared spectrum rights with the CBA members), would deprive competing operators of compensation for their loss of spectrum use rights in the U.S. C-band—even though the loss of precisely the same shared rights, and not past U.S C-band revenue, forms the entire basis of the CBA's own claimed right to compensation.[5]

In addition to being illogical and harmful to competition,[6] the proposed requirement clashes with the FCC's well-established understanding of incumbency in the very decisions relied on by the CBA. Not one decision conditioned the expansion of spectrum use rights on a revenue requirement of any kind. Just the opposite. In the AWS-4 proceeding, although the Commission recognized that neither of the two incumbent MSS licensees had made any use of their ancillary terrestrial component authorizations,[7] it nevertheless agreed to "replace" those authorizations "with full flexible use terrestrial authority" by assigning the incumbents new Part 27 licenses.[8] Along the same lines, the FCC approved the transfer of AWS-1 licenses even though the sellers had failed to

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Secretary, FCC, at Attachment pp. 4-5, 7-9, GN Docket No. 18-122 (filed Dec. 18, 2018) (demonstrating the potential value of the model to various C-band stakeholders) ("SSO Dec. 18, 2018 Letter").

3 CBA Feb. 6, 2019 Letter at 11.

4 *See* SSO Reply Comments at 2, 9.

5 *See id* at 1-3, 11-12.

6 *See id.* Importantly, the CBA's loose commitment to use a portion of transition proceeds to launch additional space stations cannot make up for the loss in competition that will result from the imposition of an arbitrary historic revenue requirement. Even assuming CBA members launch enough space stations quickly enough to provide sufficient additional capacity to C-band users, the exclusion of competitors will eliminate choice for C-band users. *See* Letter from Pantelis Michalopoulos and Georgios Leris, Counsel, ACA to Marlene H. Dortch, Secretary, FCC at 3, GN Docket No. 18-122 (filed Dec. 20, 2018) (noting that the CBA satellite construction plan does not account for the "need to preserve competitive choice").

7 *Service Rules for Advanced Wireless Servs. in the 2000-2020 MHz & 2180-2200 MHz Bands*, 27 FCC Rcd. 3561, 3566 ¶ 8 (2012) ("AWS-4 NPRM") ("To date there remains little commercial use of this spectrum for MSS and none for terrestrial (ATC) service").

8 *Service Rules for Advanced Wireless Servs. in the 2000-2020 MHz & 2180-2200 MHz Bands*, 27 FCC Rcd. 16,102, 16,104 ¶ 2 (2012).

place any facilities "into commercial service"[9]—which the CBA all but concedes in its letters.[10] Importantly, a revenue requirement, if applied here, would depart from this precedent with no plausible justification, because it would exclude licensees that *have* built licensed C-band facilities: the numerous satellites in the SSO fleet that provide U.S. C-band coverage and are on the Permitted List.

For much the same reason, the proposed revenue requirement conflicts with more recent precedent governing spectrum in UMFUS bands. For example, when the FCC approved the FiberTower-AT&T transaction, it did so even though FiberTower failed to construct facilities using the vast majority of licenses subject to the transfer of control.[11] Indeed, the FiberTower sale was only made possible by the FCC's decisions to settle claims around FiberTower's non-compliance with construction deadlines and grant a waiver reinstating hundreds of unbuilt FiberTower licenses.[12] A settlement agreement over buildout violations also paved the way for Straight Path's transfer of unbuilt licenses to Verizon.[13] More to the point, when the Commission granted flexible use rights to FiberTower, Straight Path, and other millimeter wave incumbents, it explicitly recognized that many of them had yet to deploy facilities, let alone rollout the commercial services necessary to generate revenue in the band.[14] In fact, the Commission even extended construction deadlines to enable unbuilt incumbents in the 28 GHz and 39 GHz bands to participate in the benefits of the reallocation.[15] Thus, just like precedent from AWS-1 and AWS-4, the Commission's handling of UMFUS licensing for 5G services contradicts the CBA's proposed revenue requirement.

The EBS/BRS proceeding is no different in any sense relevant here. There, the FCC granted additional use rights to any incumbent licensee so long as the licensee "complied with our existing rules and continue[s] to comply with our new rules."[16] The FCC did not apply a gating

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9 *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent to Assign AWS-1 Licenses et al.*, Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd. 10,698, 10,715 ¶ 45 (2012).

10 *See* CBA Feb. 6, 2019 Letter at 12 (noting that SpectrumCo and Cox failed to build out AWS-1 licenses acquired through government auction).

11 *See Application of AT&T Mobility Spectrum LLC and FiberTower Corporation for Consent to Transfer Control of 39 GHz Licenses*, Memorandum Opinion and Order, 33 FCC Rcd. 1251, 1259 ¶ 22 (WTB 2018).

12 *Id.* at 1253, 1259 ¶¶ 6, 22.

13 *Application of Verizon Communications Inc. and Straight Path Communications, Inc. For Consent to Transfer Control of Local Multipoint Distribution Service, 39 GHz, Common Carrier Point-to-Point Microwave, and 3650-3700 MHz Service Licenses*, Memorandum Opinion and Order, 33 FCC Rcd. 188, 192 ¶ 11 (WTB 2018).

14 *See Use of Spectrum Bands Above 24 GHz for Mobile Radio Servs.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 8014, 8031, 8901-92 ¶¶ 41-42, 219-220 (2016).

15 *Id.* at 8091-92 ¶¶ 219-220.

16 *Amendment to Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd. 14,165, 14,176 ¶ 20 (2004).

requirement of past revenue; in fact, it explicitly declined to "reclaim licenses" from any incumbent in good standing.[17]

These decisions demonstrate that incumbent licensees who have observed the rules applicable to their service deserve equal treatment—and that, in some cases, the FCC has excused even egregious instances of non-compliance to allow even unbuilt incumbent licensees to participate in a reallocation. Yet here, the CBA is attempting to exclude competing satellite licensees who not only have complied with all applicable FCC rules, but have successfully deployed numerous U.S. C-band space stations after hundreds of millions of dollars of U.S.-focused investment.[18] No established principle of spectrum management, and certainly none identified in the decisions cited by the CBA, can support the CBA's arbitrary effort to exclude its competitors.

II. The CBA Proposal Is the Definition of "Command and Control" Government Action.

The CBA argues that the FCC must clear the band voluntarily if it wishes to reallocate the band "as fast as possible"[19] and avoid the unfairness of "'command and control' government compulsion."[20] On that basis, the CBA claims that alternatives to its proposal are destined for failure, because only its proposal will secure a voluntary relinquishment of C-band rights.

While the CBA claims the transition must be voluntary, its proposal is anything but. To start, the CBA simply does not represent all licensees authorized to operate satellites in the U.S. C-band. It represents *just half* due to its self-serving effort to reduce the number of companies with whom it must split transition proceeds.[21] Moreover, while the CBA claims it will pay to relocate C-band satellite customers, it has declined to offer any incentive for earth station owners to relinquish their rights voluntarily. Even worse, the CBA has described cable operator efforts to protect their rights as a "shakedown,"[22] a provocation that is the canary in the coal mine for the disputes—and delays—that will plague the proposed CBA-run transition.

How does the CBA propose the FCC handle the interests of those it has excluded? By rubber-stamping a plan that enriches a few and eliminates the rights of all others *by rule* in lieu of offering economic incentives to secure their voluntary cooperation. As George Orwell wrote, "all … are

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17 *Id*.; *see also* at 14,169, 14,198 ¶¶ 6, 73-74.

18 *See* SSO Reply Comments at 14-15 (noting that "[s]atellite operators that have progressed significantly through the satellite lifecycle, but have yet to lease capacity in a particular service area, are, if anything, more deserving of rights to participate in a transition mechanism" than traditional incumbents, because "satellite licenses and grants of U.S. market access require substantially more time and effort to obtain," and "satellite operators also must commit more resources in reliance on their FCC authorizations before they begin commercial operations.")

19 CBA Jan. 2, 2019 Letter at Attachment p.1; *see also* CBA Jan. 31, 2019 Letter at 1.

20 CBA Feb. 4, 2019 Letter at Attachment p.2.

21 *See* SSO Reply Comments at 27; SSO Dec. 18, 2018 Letter at Attachment pp. 5, 9-10.

22 Kelcee Griffis, *Lawsuits Inevitable With C-Band Sale, Google And Charter Say*, Law360 (Feb. 5, 2019, 7:06 PM), https://www.law360.com/articles/1125958/lawsuits-inevitable-with-c-band-sale-google-and-charter-say.

equal … but some are more equal than others."[23] Or to use the CBA's vocabulary, this is textbook "command-and-control" regulation.

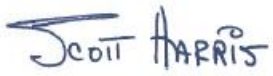
Importantly, at least one alternative proposal on the record—the SSOs'—would avoid these sources of friction by offering earth station owners meaningful incentives both to participate in the transition and to complete the clearing as quickly as possible, and by allocating proceeds to all satellite licensees.[24] The SSOs' proposal also would provide for substantial participation by, and proceeds to, U.S. taxpayers, an important element wholly missing from the CBA proposal.

Moreover, even the auction-based proposal that has been the target of the CBA's latest missives would at least *attempt* to secure participation by all satellite licensees through the use of incentives.[25] While the CBA may threaten to "hold out" because it views those incentives as insufficient, their mere availability demonstrates that these alternatives are far more "voluntary" than the naked self-enrichment advocated by the CBA. Again, under the CBA proposal, the *only* licensees that would receive meaningful compensation are the handful of companies that comprise the CBA itself. The CBA's wanton exclusion of other stakeholders cannot be justified by logic, precedent or fundamental fairness—and ultimately will result in a slower and less successful transition.

* * *

There are any number of fair and reasonable ways for the Commission to reallocate the lower C-band. But the CBA's current self-refuting money-grab is not one of them. Accordingly, if the Commission wishes to unleash more 5G spectrum quickly and effectively, it should pursue an alternative and incentive-based proposal.

Sincerely,



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[23] George Orwell, Animal Farm (1945).

[24] SSO Reply Comments at 1-5, 21-26; SSO Dec. 18, 2019 Letter at Attachment pp. 3-4.

[25] See Reply Comments of T-Mobile at 35, GN Docket No. 18-122 (filed Dec. 11, 2018) (recognizing that the SSOs "share spectrum rights" with and are "similarly situated to" CBA members).